



# WORKPLACE RELATIONS & OHS

KEEPING YOU IN THE KNOW



## Q2 Update: while you were sleeping...

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There has been much discussion about the macroeconomic picture of our workplace relations system in recent times with the gig economy, “wage theft”, the ACTU’s “change the rules” campaign, enterprise bargaining trends – and of course that leadership circus in Canberra a couple of weeks ago! That said, in case you haven’t been following it, the Fair Work Commission has been working away for a long time on the 4 yearly review of modern awards and plain language drafting review.

On the whole, a number of these changes will inevitably increase (and, in some cases, have already increased) the cost of doing business, particularly in terms of running Award-sensitive businesses. This continues to occur in the face of the existential threats posed by the gig economy, while also only further complicating the “better off overall test” for the purposes of making enterprise agreements.

Whether the changes have an impact on your business will depend on whether your employees are covered by the varied Awards and enterprise agreements that are underpinned by the varied Awards, particularly if any agreements have or will soon have expired.

We have summarised some of the key changes below.

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## Four yearly review of Modern Awards

| Issue   | Change/proposed change   | Status  | Implications   |
|---|--|---|--|
| <b>Abandonment of Employment</b> <sup>1</sup> | <p>Deletion of a clause that was in 6 modern awards (including the Manufacturing and Associated Industries and Occupations Award 2010) providing for automatic termination generally after an employee had been absent for 3 days or more.</p> <p>The Full Bench proposed a “Reasonable Inquires about certain absences” clause.</p>   | Submissions have been filed in relation to the proposed clause.   | <p>If the proposed “Reasonable Inquiries about certain absences” clause is approved, the onus would be shifted onto the employer by requiring them to take certain steps in regard to an employee’s absence. It is clear though that “deemed” termination is a thing of the past as contrary to the NES.</p>                                     |
| <b>Casual Conversion</b> <sup>2</sup>         | <p>85 modern awards are to be varied to insert a casual conversion clause.</p> <p>Subject to any changes as a result of the final submissions filed from interested parties, the model clause essentially:</p> <ul style="list-style-type: none"> <li>enables “regular” casual employees to request that their employment be converted to full time or part time after 12 months.</li> <li>employers can refuse a request on “reasonable grounds” and after consultation with the employee.</li> </ul> <p>This clause also applies to workers engaged in labour hire arrangements.</p> | Effective 1 October 2018. Interested parties have filed final submissions as to the final form of the clause.   | <p>It appears a right of refusal will remain for employers subject to business needs – which would be a very important win.</p> <p>What about those Awards that already have existing casual conversion clauses? Those Awards will remain unaffected by this change and still require compulsory conversion after 6 months where applicable.</p> |
| <b>Minimum Engagement</b> <sup>3</sup>        | <p><b>Casuals:</b> The Full Bench has expressed the view that 34 modern awards that do not contain a minimum daily engagement period should be varied to include a minimum 2-hour minimum engagement period for casuals.</p> <p><b>Casual and Part Time Employees under the Manufacturing and Associated Industries and Occupations Award 2010:</b> Part time and casual employees under this Award can currently request and the employer can agree, to a reduction in the minimum engagement period. The Full Bench varied this to include a minimum “floor” of 3 hours.</p>         | Final draft determinations to give effect to this change will be published with the parties given 7 days to comment. The final variations are planned to take effect on 1 October 2018. | Less flexibility and increased employer cost commitment for causal and certain part time employment.   |

1. Directions, Abandonment of Employment – Common Issue, 7 August 2018; Abandonment of Employment [2018] FWCFB 139, 23 January 2018.

2. 4 yearly review of modern awards - Part-time employment and Casual employment [2018] FWCFB 4695, 9 August 2018.

4 yearly review of modern awards – Casual employment and Part-time employment [2017] FWCFB 3541, 5 July 2017.

4 yearly review of modern awards—Casual employment and Part-time employment [2017] FWCFB 6181, 24 November 2017.

3. 4 yearly review of modern awards - Part-time employment and Casual employment [2018] FWCFB 4695, 9 August 2018.

## Four yearly review of Modern Awards

| Issue  | Change/proposed change   | Status   | Implications  |
|--|--|--|---|
| <b>Casual Hourly Rate Building and Construction General On-Site Award 2010</b> <sup>4</sup>  | The Full Bench has determined to vary this Award to clarify the way in which the casual hourly rate was to be calculated.  | Final variation has been deferred to a later date due to a pending Full Bench decision regarding a review of this Award and other construction Awards regarding the issue of allowances. | Likely cost increases for casuals in on-site construction work. Given Skene issues though, this is probably now at the lower end of the priority issues.  |
| <b>Family and Domestic Violence Leave</b> <sup>5</sup>   | <p>A term dealing with unpaid leave for family and domestic violence was inserted into all modern awards.</p> <p>This has been determined – see implications further across for the outcome.</p>   | Effective 1 August 2018.   | <p>Full time, part time and casual employees are to be provided with 5 days' unpaid leave per year to deal with family and domestic violence leave.</p> <p>The leave does not accumulate from year to year.</p> <p>Employees have certain notice and evidentiary requirements.</p> <p>Employers have confidentiality obligations.</p> <p>Note that the Federal Government will be introducing legislation to extend unpaid domestic violence leave to federal system employees.</p> |
| <b>Family Friendly Work Arrangements</b> <sup>6</sup>  | The Full Bench expressed a provisional view that modern awards should be varied to facilitate flexible working arrangements and provided a provisional model clause.   | Parties were required to file submissions in reply in relation to a proposition about the model clause by 14 September 2018.   | Employees are likely to be able to request a change in working arrangements because of their circumstances as a parent or carer.  |
| <b>Public Holidays "Part- Day Public Holidays" clause</b> (included as a Schedule in Awards such as the <i>Manufacturing and Associated Industries Award 2010, Restaurant Industry Award 2010 and Hospitality Industry (General) Award 2010</i> ) <sup>7</sup> | <p>Most modern awards were varied in 2012 to contain an additional schedule detailing arrangements for part day public holidays. Part day public holidays are Christmas Eve and New Years Eve in South Australia, and most recently also in the Northern Territory.</p> <p>Since 2012, the schedules have been operating on an interim basis. This means that each year, they have been varied, at least to include the relevant year. The Full Bench has invited submissions as to whether this should be made permanent.</p> | Parties with an interest in the matter are invited to provide written submissions on or before 12 October 2018.  | The Part- Day Public holidays Schedule in some awards could potentially be made ongoing and not dependent on a variation each year.   |

4. 4 yearly review of modern awards - Part-time employment and Casual employment [2018] FWCFB 4695, 9 August 2018.

5. 4 yearly review of modern awards – Family and Domestic Violence Leave [2018] FWCFB 3936, 6 July 2018.

6. 4 yearly review of modern awards - Part-time employment and Casual employment [2018] FWCFB 4695, 9 August 2018.

7. Part-day public holidays [2018] FWCFB 5803 14 September 2018.

Part – Day Public Holidays (Report to the Full Bench), [2018] FWC 4713 23 August 2018.

Part-day public holidays [2018] FWCFB 4131 18 July 2018.

Part-day public holidays [2018] FWCFB 3516 15 June 2018.

## Four yearly review of Modern Awards

| Issue   | Change/proposed change   | Status   | Implications   |
|---|--|--|--|
| <b>Payment of Wages in Awards that are silent</b> (eg <i>Hospitality Industry (General) Award 2010</i> and the <i>General Retail Industry Award 2010</i> ) <sup>8</sup> | <p>The Full Bench has confirmed its provisional view that 83 modern awards that are silent in relation to the time period during which termination payments are to be made should be varied to insert the model "Payment on termination of employment" term that has been finalised by the Full Bench.</p>   | <p>It is unclear when the final effective date will be determined.</p>   | <p>Under the model "payment on termination of employment" clause:</p> <ul style="list-style-type: none"> <li>Employers must pay an employee wages for any complete or incomplete pay period up to the end of the day of termination and all other amounts that are due to the employee under the Award and the NES no later than 7 day after the day on which their employment terminates.</li> <li>NB: Payment within a shorter period is required in regards to certain Fair Work Act 2009 entitlements and long service leave legislation.</li> </ul> |
| <b>Annualised Salaries</b> <sup>9</sup>   | <p>The Full Bench recently looked at a number of considerations regarding what is necessary for an annualised wage arrangement provision to form part of what it considered to be "the fair and relevant minimum safety net of terms and conditions" required under the Fair Work Act 2009.</p> <p>Such considerations include the variability of work, whether the arrangement should be made in writing, whether there should be a guarantee of the arrangement being no less favourable, whether it should be capable of termination in annual periods and whether it should just be restricted to full time employees.</p> | <p>The Full Bench has provisionally considered a number of model clauses to give effect these change. Submissions from interested parties have been invited on a number of issues.</p> | <p>Clearly this would restrict flexibility with the use of annualised salaries and have the potential to make it all too hard.</p> <p>However, previous cases have canvassed the ongoing use of Ecobb clauses outside the Modern Award framework, irrespective of the annualised salaries provision. It would remain to be seen whether the current Federal Court would agree or disagree with that proposition so these kinds of restrictions necessarily have a chilling effect on the use of annualised arrangements.</p>                             |
| <b>Penalty Rates</b> <i>General Retail Industry Award 2010</i> <sup>10</sup>  | <p>Parties have been invited to file submissions in relation to the number of and any other characteristics relating to, shift workers covered by this award and the proposed transitional arrangements.</p>   | <p>Submissions were filed by 6 September 2018.</p>   | <p>While the last penalty rates decision took over 2 years to be heard and determined, those gains for business may be eroded much more quickly with these changes.</p>  |

8. 4 yearly review of modern awards – Payment of Wages – Plain Language – Standard Clauses [2018] FWC 4976, 24 August 2018.

4 yearly review of modern awards – Payment of wages, [2018] FWCFB 4735, 15 August 2018.

4 yearly review of modern awards – Payment of wages [2018] FWCFB 3566, 17 July 2018.

9. Annualised Wage Arrangements [2018] FWCFB 154, 20 February 2018.

10. 4 yearly review of modern awards – General Retail Industry Award 2010, Directions, 24 August 2018.

## Plain language drafting review

As part of the 4 yearly review of Awards, the Full Bench of the FWC is overseeing a number of plain language projects as part of the review including the review of a number of clauses in modern awards which have been identified as 'standard clauses'.

We have summarised some key ones below.

| Issue   | Change/proposed change   | Status   | Implications   |
|---|--|--|--|
| <b>Clause E Termination of Employment</b> <sup>11</sup>                   | <p>The Full Bench has decided on a revised model standard term clause E 'Termination of Employment'.</p> <p>The proposal includes that an employer must give written notice and that an employee can be subject to deductions from wages if the employee does not give the requisite notice subject to age requirements and the potential for the deduction to be unreasonable.</p>  | <p>The Full Bench expressed the provisional view that all awards should be varied to insert this redrafted clause.</p> <p>Draft determinations have been published and it is unclear whether the timeframe for lodging submissions has closed.</p> | <p>The ability to make deductions in the event of notice not being served is a key win for employers, but the introduction of an "unreasonable" requirement may make that illusory.</p> <p>As such, it will be important to ensure contracts additionally draw employees' attention to this issue upfront.</p> |
| <b>Employee leaving during the redundancy notice period</b> <sup>12</sup> | <p>The Full Bench has expressed a provisional view that all modern awards should be varied to insert a revised clause permitting job search leave during the notice period of one day per each week of notice.</p>   | <p>Draft determinations have been published and it is unclear whether the timeframe for lodging submissions has closed.</p>  | <p>This is common practice already in many workplaces.</p> <p>That said, where handovers need to be completed and/or projects finished prior to separation, this removes 20% of that working time during the notice period.</p>  |
| <b>Reasonable overtime</b> <sup>13</sup>                                  | <p>The Full Bench stated that a model term should make explicit both the employer's right to require an employee to work reasonable overtime and an employee's right to refuse to work unreasonable additional hours.</p> <p>The Full Bench has drafted a model term to this effect and in relation to what must be taken into account in determining whether the overtime hours are reasonable or unreasonable, the Full Bench has provided three options:</p> <ul style="list-style-type: none"> <li>one lists the factors in s 62(3) of the <i>Fair Work Act 2009</i>;</li> </ul> | <p>Submissions have been invited in relation to the third subclause by 2 October 2018.</p> <p>Submissions in reply are then due by 16 October 2018. A hearing will be held on Tuesday 23 October 2018 to finalise the issue.</p>                   | <p>This will likely only increase the regulatory burden for employers seeking to exercise their right to require an employee to work reasonable overtime in terms of the factors to be taken into account in determining whether the overtime hours are reasonable or unreasonable.</p>                        |

- 4 yearly review of modern awards – plain language re-drafting – standard clauses [2018] FWCFB 4704, 14 August 2018.  
4 yearly review of modern awards – Plain language re-drafting – Standard clauses [2018] FWCFB 3009, 13 June 2018  
4 yearly review of modern awards – plain language re-drafting – standard clauses [2018] FWCFB 4181, 19 July 2018
- 4 yearly review of modern awards – General Retail Industry Award 2010, Directions, 24 August 2018.  
4 yearly review of modern awards – Plain language re-drafting – Standard clauses [2018] FWCFB 3009, 13 June 2018
- 4 yearly review of modern awards- reasonable overtime [2018] FWCFB 5749 17 September 2018.

| Issue  | Change/proposed change   | Status  | Implications  |
|--|--|---|---|
| <i>Reasonable overtime continued</i>   | <ul style="list-style-type: none"> <li>another proposes to incorporate the s 62(3) Fair Work Act 2009 in a note to the subclause; and</li> <li>another refers to the factors as being set out in s 62(3) of the Fair Work Act 2009.</li> </ul> <p>Examples of awards which the model term would be inserted into once finalised are the <i>General Retail Industry Award 2010</i> and the <i>Manufacturing and Associated Industries and Occupations Award 2010</i>.</p> |   |   |
| <b>Inconsistent terminology between different awards for the same payments</b> <sup>14</sup> | There is inconsistent terminology used in various Awards to describe compensation owed to employees for working shiftwork. It is described as penalties, loadings, allowances, or rates in modern awards.  | This matter has been referred to the Plain Language Full Bench and remains outstanding as at the decision of 21 March 2018. | This is not intended to make any practical difference, but it is still one to watch closely in order to determine the interaction with other entitlements – eg a penalty might be required to be paid all-purpose whereas an allowance may not. |
| <b>Annual, weekly and hourly rates in minimum wages tables</b> <sup>15</sup>                 | The minimum wages table in many awards do not state that the table applies to full-time employees. It has been decided that a consistent approach is required.   | The matter has been referred to the Plain Drafting Full Bench to be dealt with but no date has been set.                    | This should only be a technical amendment which should make clearer that part time employees and casual employees don't get the "full time" amount (as distinct from the rate).   |
| <b>Substitution of Public holidays for other days by agreement</b> <sup>16</sup>             | Plain Language Full Bench will undertake a broader review of all awards containing a term which provides for the substitution of public holidays by either majority agreement, or unilaterally by an employer.   | No date has been set.   | We can only speculate, but it is doubtful whether this will progress to allow unilateral variation, or indeed if it did that it wouldn't result in a substantial penalty in those circumstances.  |

14. 4 yearly review of modern awards – Plain language re-drafting [2018] FWC 1544, 21 March 2018.

15. 4 yearly review of modern awards – Plain language re-drafting [2018] FWC 1544 21 March 2018.

16. 4 yearly review of modern awards – Plain language re-drafting [2018] FWC 1501 15 March 2018.

## Even more changes for Victorian employers! *Long Service Leave Act 2018 (Vic)*

| Issue                               | Change   | Effective Date   | Implications  |
|-------------------------------------|--|------------------|---|
| <b>Victorian Long Service Leave</b> | <ul style="list-style-type: none"> <li>An employee will now be entitled to take LSL after 7 years of continuous service with one employer (it is currently 10 years' service).</li> <li>An employee will be able to take LSL at a minimum of one day's leave at a time.</li> <li>Any period of paid parental leave and up to 12 months' of unpaid parental leave will count as service, and no amount of parental leave will break continuity of service.</li> <li>The employer and employee may agree at the time that the unpaid leave commences, that a period of unpaid leave beyond 12 months will count as service.</li> <li>New methods have been introduced to calculate LSL where an employee's hours of work are not fixed or where they have changed over a period of employment.</li> <li>Criminal rather than civil penalties will now apply for taking adverse action against an employee because s/he is entitled to LSL and for failing to disclose that an employment agreement would modify or remove an employee's LSL entitlements.</li> </ul> | 1 November 2018. | All Victorian employers should prepare for the upcoming changes by updating payroll systems to ensure LSL accruals include parental leave periods, training managers so that they may properly respond to requests for LSL, ensuring ongoing compliance by regularly reviewing LSL records. |

### Stay awake and be ready ...

Employers of all sizes need to stay on top and monitor implementation of the above changes and proposed changes as and when they apply to their workplaces so as to ensure that they are complied with and to avoid attracting potential penalties.

If you require further information on the issues raised in this update or need assistance navigating through the whirlwind of changes and proposed changes, please contact KHQ Lawyers.

Kind regards,

Chris, Michael & the team.

